

**VIRGINIA:
IN THE CIRCUIT COURT FOR ESSEX COUNTY**

DAVID K. PAYLOR, Director of the)
Department of Environmental Quality;)
)
and)
)
STATE WATER CONTROL BOARD,)
Plaintiffs;)
)
v.)
)
)
MCCARTHY BUILDING COMPANIES, INC.,)
A Missouri Corporation;)
)
and)
)
ESSEX SOLAR CENTER, LLC,)
A Virginia Limited Liability Company)
)
)
Defendants.)

CASE NO. CL 200000091-00

CONSENT DECREE

COME NOW the Plaintiffs David K. Paylor, Director of the Department of Environmental Quality (the "Department" or "DEQ"), and the State Water Control Board (the "Board")(collectively the "Plaintiff" or the "Commonwealth"), and the Defendants, McCarthy Building Companies, Inc.; and Essex Solar Center, LLC, on behalf of themselves, their employees, officers, directors, agents, related entities, successors, and assigns, to resolve the matters in controversy between them, having agreed to the terms of this Consent Decree, as follows:

WHEREAS Plaintiffs have filed a Complaint in this matter asserting alleged violations of the State Water Control Law, the Virginia Stormwater Management Act, the Virginia Erosion

A True Copy
Teste: Gayle J. Ashworth, Clerk
Mejor V. Ashworth
Clerk or Deputy Clerk
Date: 3/18/2020
Essex County Circuit Court

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and Sediment Control Law, the Virginia Stormwater Management Program Regulations, the Erosion and Sediment Control Regulations, the Virginia Water Resources and Wetlands Protection Program, the General Virginia Pollutant Discharge Elimination System Permit for Discharges of Stormwater from Construction Activities, and the Small Renewable Energy Projects (Solar) Permit by Rule (collectively, the “Allegations”) against Defendants;

WHEREAS Defendants deny the Allegations and any claims of wrongdoing asserted in the Complaint and this Consent Decree;

WHEREAS the Parties, as evidenced by the signatures that follow, have consented to the entry of this Consent Decree without trial of any issues; and

WHEREAS the Parties recognize, and this Court finds by entering this Consent Decree, that the Parties have negotiated this Consent Decree in good faith, that implementation of this Consent Decree will avoid prolonged and complicated litigation between the Parties, and that the terms of this Consent Decree are fair, reasonable, and in the public interest.

NOW, THEREFORE, before the taking of any testimony, upon the pleadings, without adjudication or admission of any issue of fact or law, including any admission of liability, and upon consent and agreement of the Parties, it is hereby ORDERED, DECREED, and ADJUDGED as follows:

I. DEFINITIONS

1. For purposes of this Consent Decree, the following definitions shall apply:
 - a. “Board” means the State Water Control Board, a permanent citizens’ board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
 - b. “Construction activity” means any clearing, grading or excavating resulting in land disturbance of equal to or greater than one acre, or disturbance of less than one acre of total

land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one acre.

c. “Construction General Permit” means the General VPDES Permit for Discharges of Stormwater from Construction Activities (VAR10) promulgated at 9 VAC 25-880-70, which was issued under the State Water Control Law, the Virginia Stormwater Management Program Regulations, and the General Permit Regulation on July 1, 2014 or any duly adopted amendment to the General VPDES Permit for Discharges of Stormwater from Construction Activities under which Defendants seek authorization from the Board to discharge to surface waters of the Commonwealth.

d. “Department” or “DEQ” means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.

e. “Disturbance zone” means the area within the site directly impacted by construction and operation of the solar energy project and within 100 feet of the boundary of the directly impacted area. 9 VAC 15-60-10.

f. “Director” means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.

g. “Fill” means replacing portions of surface water with upland, or changing the bottom elevation of surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris. 9 VAC 25-210-10.

h. “Fill material” means any pollutant that replaces portions of surface water with dry land or that raises the bottom elevation of a surface water for any purpose.

- i. “Haile Dam” means the third party earthen dam located near the Site that is owned and operated by Haile Properties, LLC.
- j. “Impacts” means results caused by those activities specified in §62.1-44.15:20 A of the Code of Virginia.
- k. “Land Disturbance” or “Land-Disturbing Activity” means a man-made change to the land surface that potentially changes its runoff characteristics including clearing, grading, or excavation, except that the term shall not include those exemptions specified in Va. Code § 62.1-44.15:34.
- l. “Notice of Violation” or “NOV” means a type of Notice of Alleged Violation under Va. Code §§ 62.1-44.15 and 10.1-1197.9.
- m. “Pollutant” means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution. 9 VAC 25-210-10.
- n. “Pollution” means such alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters: (i) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (a) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (b) the discharge of untreated sewage by

any owner into state waters; and (c) contributing to the contravention of standards of water quality duly established by the board, are "pollution." Va. Code § 62.1-44.3; 9 VAC 25-210-10.

o. "Property" or "Site" means the Essex Solar Facility located in Essex County, Virginia at the northeast corner of the intersection of Route 17 and Route 607 (Muddy Gut Road).

p. "Restoration" means the reestablishment of a wetland or other aquatic resource in an area where it previously existed. Wetland restoration means the reestablishment of wetland hydrology and vegetation in an area where a wetland previously existed. Stream restoration means the process of converting an unstable, altered, or degraded stream corridor, including adjacent areas and floodplains, to its natural conditions.

q. "Small Renewable Energy Projects Law" means Chapter 11.1 (§ 10.1-1197.5 *et seq.*) of Title 10.1 of the Va. Code.

r. "Small Renewable Energy Projects (Solar) Permit by Rule" means regulations found at 9 VAC 15-60-10 *et seq.*

s. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 2.2 (Va. Code §§ 62.1-44.15:20 through 62.1-44.15:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.

t. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3 and 9 VAC 25-210-10.

u. "Stormwater" means precipitation that is discharged across the land surface or through conveyances to one or more waterways and that may include stormwater runoff, snow melt runoff, and surface runoff and drainage. Va. Code § 62.1-44.15:24.

v. “Surface water” means all state waters that are not ground waters as defined in Va. Code § 62.1-255.

w. “VAC” means the Virginia Administrative Code.

x. “Virginia Stormwater Management Act” means Article 2.3 (§ 62.1-44.15:24 et seq.) of Chapter 3.1 of Title 62.1 of the Va. Code.

y. “VSMP” means the Virginia Stormwater Management Program, which is a program approved by the Soil and Water Conservation Board after September 13, 2011, and until June 30, 2013, or the State Water Control Board on and after June 30, 2013, that has been established by a VSMP authority to manage the quality and quantity of runoff resulting from land-disturbing activities and shall include such items as local ordinances, rules, permit requirements, annual standards and specifications, policies and guidelines, technical materials, and requirements for plan review, inspection, enforcement, where authorized in this article, and evaluation consistent with the requirements of this article and associated regulations. Va. Code § 62.1-44.15:24.

z. “VSMP authority” means the DEQ, which is the authority approved by the Board to operate the Virginia Stormwater Management Program for the jurisdiction in which the Site is located.

aa. “VSMP Regulations” means the Virginia Stormwater Management Program (VSMP) Regulations, 9 VAC 25-870-10 et seq.

bb. “VWP Permit” or “Virginia Water Protection Permit” means an individual or general permit issued under Va. Code § 62.1-44.15:20 that authorizes activities otherwise unlawful under Va. Code § 62.1-44.5 or otherwise serves as the Commonwealth's certification under § 401 of the federal Clean Water Act (33 United States Code (“USC”) § 1344.

cc. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 9 VAC 25-210-10.

II. JURISDICTION AND VENUE

2. The Parties agree that this Court has jurisdiction over the subject matter herein and over the Parties. The Parties agree that venue is proper in this Court. The Parties further agree that this Court shall retain jurisdiction over the Parties with respect to this Consent Decree as it relates to the Site until coverage under the Construction General Permit is terminated pursuant to 9 VAC 25-880-60. Upon termination of coverage under the Construction General Permit, this Consent Decree shall terminate automatically; however, either Party individually, or the Parties jointly, may move the Court to retain jurisdiction and extend the duration of this Consent Decree to ensure compliance with the terms of this Consent Decree. Termination of this Consent Decree, or any obligation imposed by this Consent Decree, shall not operate to relieve Defendants from their obligation to comply with any statute, regulation, permit condition, plan, or other order, certificate, certification, standard, or requirement otherwise applicable.

III. PARTIES

3. The obligations of this Consent Decree apply to and are binding upon Plaintiffs and Defendants, and any of their respective successors, assigns, or other entities or persons otherwise bound by law. Except as expressly provided herein, this Consent Decree shall not create any rights in any party other than the Parties to this Consent Decree.

IV. STIPULATED FACTS

4. The Plaintiffs are David K. Paylor, Director of the Department of Environmental Quality, and the State Water Control Board. The Defendants are McCarthy Building Companies, Inc. (“Defendant” or “McCarthy”), a Missouri corporation with its principal business address at 1341 North Rock Hill Road, St. Louis, Missouri 63124; Essex Solar Center, LLC (“Defendant” or “Essex”), a Virginia limited liability company with its principal business address at 301 N. Lake Avenue, Suite 202, Pasadena, CA 91101.

5. McCarthy is the operator and permittee for construction activities located at the Essex Solar Center in Essex County, Virginia (the “Site”), from which stormwater associated with construction activity is discharged.

6. DEQ is the Virginia Stormwater Management Program (“VSMP”) authority for the Property.

7. McCarthy’s engineering consultant prepared erosion and sediment control and stormwater management plans dated June 28, 2017 (“June 28, 2017 Plans”) under the seal of a Virginia licensed Professional Engineer.

8. On July 5, 2017, DEQ approved the stormwater management plan contained in the June 28, 2017 Plans.

9. On July 6, 2017, Essex County, the Virginia Erosion and Sediment Control Program (“VЕСP”) authority, approved the erosion and sediment control plan contained in the June 28, 2017 Plans.

10. On July 5, 2017, DEQ granted coverage to McCarthy under the Construction General Permit. DEQ assigned McCarthy registration number VAR10J622.

11. The Construction General Permit allows McCarthy to discharge stormwater associated with construction activities from the Site to unnamed tributaries of Piscataway Creek

and Muddy Gut (Rappahannock River Basin) in strict compliance with the terms and conditions of the permit. The unnamed tributaries of Piscataway Creek and Muddy Gut are surface waters located wholly within the Commonwealth and are “state waters” under the State Water Control Law.

12. DEQ granted coverage to Coronal Development Services, LLC/Essex Solar Center LLC under the Small Renewable Energy Projects (Solar) Permit by Rule (“Solar PBR”) on December 7, 2016. Coronal Development Services, LLC transferred all rights and interests in the Permit and the Essex Solar Center project to Essex Solar Center, LLC. DEQ assigned Essex Solar Center LLC registration number (2016-S 06).

13. In the interest of resolving the Commonwealth’s claims, the Commonwealth and the Defendants have agreed on a basis for the settlement of the Complaint and stipulated to entry of this Consent Decree between the parties without trial or the adjudication of the validity of any alleged issue of law or fact.

14. The Defendants do not admit the allegations set forth in the Commonwealth’s Complaint or any liability related to those allegations. Defendants affirmatively state that their execution of this Consent Decree is for settlement purposes only.

15. The Defendants and the Commonwealth waive their right to appeal from this Consent Decree and enter into this Consent Decree voluntarily and state that no promises of any kind were made to enter into this Consent Decree, except as provided herein.

16. The Defendants acknowledge and agree that the Commonwealth’s Complaint in this matter states claims upon which relief could be granted under the provisions of the State Water Control Law.

17. The Defendants consent to and submit themselves to the jurisdiction of this Court and waive any objections they may have had to the jurisdiction of this Court over them for all matters relating to the entry, execution, monitoring, and enforcement of this Consent Decree. The Defendants further waive any objections they may have had to venue in this Court for matters relating to the entry, execution, monitoring, and enforcement of this Consent Decree.

V. INJUNCTIVE RELIEF

18. McCarthy has submitted to the Department for review and approval modifications to its approved SWM Plans to address post-construction stormwater at the Site. Submissions of modified SWM Plans have included the construction stormwater general permit registration statement. The SWM Plan modifications must conform to the Virginia Stormwater Management Act and Regulations, be suitable for Department approval and be prepared using accepted engineering practices by a licensed Professional Engineer (PE). The Department will review the SWM plans as expeditiously as possible. McCarthy shall revise the SWM Plan modifications in accordance with applicable laws and regulations as directed by the Department and respond to any Department comments regarding the SWM Plan modifications within seven (7) days or a later date agreed upon by both McCarthy and the Department. Upon approval by the Department, McCarthy shall immediately begin implementation of the approved SWM Plans.

19. The DEQ approved the Restoration and Corrective Action Plan (RCAP) received by the DEQ on January 4, 2019 subject to the following requirements: any new impacts must be incorporated into an RCAP addendum submitted to DEQ within 30 days of each new impact occurrence. The addendum (or addenda) must include updated Tables 1, 2 and 3, appropriate figures as needed, and an updated schedule, and must contain or reference restoration and monitoring methods for the new impact areas.

20. McCarthy shall implement the work specified in the RCAP in accordance with its terms and the schedule contained therein. Any changes to the approved RCAP or schedule contained therein shall not be initiated without advance notice to and approval by DEQ.

21. If the performance criteria specified in the RCAP are not achieved at the end of any monitoring period, then McCarthy shall so advise DEQ and Essex in the applicable monitoring report for that monitoring period and shall describe why it appears the criteria could not be achieved, identify and propose corrective action, and a schedule necessary to achieve the performance criteria. McCarthy shall respond to any DEQ notice of deficiency regarding the proposed corrective action in accordance with applicable laws and regulations as set forth in the notice. McCarthy shall begin implementation of the proposed corrective action in accordance with its terms and the schedule set forth therein and approved by DEQ.

22. If the performance criteria specified in the RCAP are not achieved by the end of the last monitoring period and DEQ determines that additional corrective action cannot sufficiently address the reasons for such failures, then McCarthy shall submit to DEQ for review and approval, within 30 days of such determination or request, a proposal to purchase credits from a DEQ approved mitigation bank or make contributions to a DEQ approved in-lieu fee fund to address any remaining or substituted restoration or corrective action. McCarthy shall respond to any DEQ notice of deficiency to the proposal in accordance with the terms of the notice. McCarthy shall purchase mitigation bank credits or make contributions to an in-lieu fund, as approved by DEQ in accordance with this paragraph, within 30 days of DEQ approval and shall submit proof of purchase or contribution to DEQ.

23. Upon completion of the RCAP, McCarthy shall submit to the Department a final report with photographic documentation demonstrating compliance with 9 VAC 25-210 *et seq.*, and with a request for a final Department compliance inspection.

24. McCarthy, at its expense, shall continue to retain its Stormwater Compliance Manager, Resource Environmental Solutions, LLC ("RES") (or other DEQ approved Stormwater Compliance Manager), until Construction General Permit coverage is terminated pursuant to 9 VAC 25-880-60. The Stormwater Compliance Manager shall be responsible for coordinating oversight of compliance with the Erosion and Sediment Control Plan, the Stormwater Management Plan, and the Construction General Permit at the Site. In addition, the Stormwater Compliance Manager shall conduct periodic meetings with personnel performing Land-Disturbing Activities, engaged in site stabilization, or Plan implementation. Such periodic meetings shall occur in advance of any new Land-Disturbing Activity, at least once per week while any Land-Disturbing Activity is taking place, and at least once monthly while the Site is being stabilized until final stabilization is achieved and until Construction General Permit coverage is terminated pursuant to 9 VAC 25-880-60. All periodic meetings shall be documented and the documentation shall be kept with the Stormwater Pollution Prevention Plan ("SWPPP") on site.

25. On June 28, 2019, Essex submitted a Restoration and Corrective Action Plan (Haile Dam RCAP) to DEQ for review and approval to restore the surface water impacts downstream of the Haile Dam that are described in a February 8, 2018 letter from Wetland Studies and Solutions that is attached as Appendix A. The Haile Dam RCAP was designed to restore stream and wetland functions by removing deposited sediment. DEQ approved the Haile Dam RCAP on September 30, 2019.

26. On or before December 8, 2019, Essex shall submit a modification to its Solar PBR to reflect new ownership and expanded site footprint.

27. McCarthy and Essex shall consult with VDHR regarding mitigation of construction-displaced soil and fill observed in the northwest quadrant of site 44EX0277.

VI. CIVIL PENALTY

28. The Commonwealth shall recover from Defendants, and Defendants agree to cause payment to be made to the Commonwealth, the sum of Two Hundred Forty-Five Thousand and 00/100 Dollars (\$245,000.00), as a civil penalty for alleged violations of the State Water Control Law.

29. Simultaneously with the execution of this Consent Decree, Defendants agree to cause payment to be made of the civil penalty amount specified in Paragraph 28 by money order, cashier's check, or certified check payable to "Treasurer of Virginia," and delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 1104
Richmond, Virginia 23218

Any payment made pursuant to the terms of this Consent Decree shall indicate that the payment is being made in accordance with the requirements of this Consent Decree.

VII. STIPULATED PENALTIES

30. Defendants shall be liable for stipulated penalties to the Plaintiffs for violations of this Consent Decree as specified below, unless excused under Section VIII (Force Majeure).

31. For engaging in Land-Disturbing Activity without a Construction General Permit issued by the State Water Control Board, \$5,000 per acre disturbed plus \$250 per day until permit coverage is issued.

32. For engaging in Land-Disturbing Activity without an approved Stormwater Management Plan, \$250 per day;
33. for engaging in Land-Disturbing Activity without an approved Erosion and Sediment Control Plan, \$250 per day per violation;
34. for failure to stabilize denuded areas, stockpiles, and earthen structures in accordance with the Virginia Erosion and Sediment Control Regulations, \$250 per day per violation;
35. for failure to install, properly install, repair or maintain erosion and sediment controls, post-construction stormwater management BMPs or other pollution prevention measures in accordance with the Virginia Erosion and Sediment Control Regulations and VSMP Regulations, \$250 per day per violation;
36. for discharging a pollutant, that results in the accumulation of fill material, a separate penalty shall apply for each separate, identifiable, and discrete discharge to wetlands and streams:
- a. impacts to more than two (2) acres of wetlands or more than 1,500 linear feet (LF) of stream, \$26,000
 - b. Impacts from 1/10 to two (2) acres of wetlands or from 301 to 1,500 LF of stream, \$13,000
 - c. Impacts to less than 1/10 acre of wetlands or up 300 LF of stream, \$6,500
37. for failure to notify the Department of Environmental Quality of an unpermitted discharge as required by § 62.1-44.5(B) and 9 VAC 25-870-310, \$500 per day per violation;
38. for failure to post a copy of the notice of Construction General Permit coverage near the main entrance of the Site, \$250 per violation;

39. for failure to maintain a copy of the approved Erosion and Sediment Control Plan at a central location on site for use by those individuals identified as having responsibilities under the Stormwater Pollution Prevention Plan whenever they are on the construction site, \$500 per violation;

40. for failure to make a copy of the Erosion and Sediment Control Plan available upon request to the Department; \$500 per violation;

41. for failure to maintain a copy of the approved Stormwater Management Plan at a central location on site for use by those individuals identified as having responsibilities under the Stormwater Pollution Prevention Plan whenever they are on the construction site, \$500 per violation;

42. for failure to make a copy of the Stormwater Management Plan available upon request to the Department, \$500 per violation;

43. for failure to identify "Qualified Personnel" in the Stormwater Pollution Prevention Plan, \$250 per violation;

44. for failure to make the Stormwater Pollution Prevention Plan available at the site or post notice of the SWPPP's location near the main entrance of the site, \$500 per violation.

45. for failure to perform Stormwater Pollution Prevention Plan self-inspections or complete reports in accordance with the Board's General Virginia Pollutant Discharge Elimination System (VPDES) Permit for Discharges of Stormwater from Construction Activities, \$500 per violation;

46. for failure to retain a Stormwater Compliance Manager as specified in Paragraph 24, \$250 per day for the first ten days and \$500 per day thereafter;

47. for failure to conduct periodic meetings as specified in Paragraph 24, \$500 per violation;

48. for failure to make payments as specified in Section VI; \$250 per day for the first ten days and \$500 per day thereafter;

49. for failure to complete the restoration in accordance with the schedule contained in the RCAP as specified in Paragraph 19, \$2,600 per day per violation.

50. for failure to submit monitoring reports as required by the RCAP, \$1,300 per day per violation.

51. for failure to respond to Request for Information as required by VSMP Regulations or denial of Site access, \$1,000 per day per violation.

52. for failure to respond to any Department comments regarding the SWM Plan modifications submitted under Paragraph 18 within seven (7) days or a later date agreed upon by both McCarthy and the Department, \$250 per day.

53. All penalties shall begin to accrue on, as may be appropriate, the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity.

54. The Department shall send Defendant a written demand for the payment of the penalties.

55. All penalties accruing under this Section shall be due and payable to the Department within 30 days of Defendant's receipt from the Department of a demand for payment of the penalties unless the Dispute Resolution provisions in Section IX are triggered. If the Plaintiffs prevail after the Dispute Resolution provisions in Section IX are triggered then

payment for penalties and any applicable interest shall be due and payable within thirty days (30) of the conclusion of the dispute process.

56. All payments to the Department under this Section shall be made by money order, cashier's check, or certified check payable to "Treasurer of Virginia," and delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 1104
Richmond, Virginia 23218

All payments to the Department under this Section shall indicate that the payment is for stipulated penalties. If the Defendant fails to pay stipulated penalties when due, the Defendant shall pay interest on the unpaid stipulated penalties at the judgment rate of interest as provided for in Va. Code § 6.2-302.

57. Nothing in this Consent Decree shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

58. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the Commonwealth to seek any other remedies available by virtue of Defendant's violation of any state law or regulation, this Consent Decree, or of the statutes and regulations upon which it is based.

59. Notwithstanding any other provision of this Section, the Department may, in its sole discretion, waive any portion of its stipulated penalties that have accrued pursuant to this Consent Decree.

VIII. FORCE MAJEURE

60. Force majeure: Defendants shall be responsible for failure to comply with any of the terms and obligations of this Consent Decree unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, protest actions by third parties, or such other

unforeseeable circumstances beyond the control of Defendants, of any entity controlled by Defendants, or Defendants' Subcontractors and not due to a lack of good faith or diligence on their part. Defendants shall demonstrate that such circumstances were beyond their control and not due to a lack of good faith or diligence on their part. "Force Majeure" does not include Defendants' financial inability to perform any obligation under this Consent Decree. Unanticipated or increased costs or expenses associated with performance of Defendants' obligations under this Consent Decree shall not constitute circumstances beyond Defendants' control, nor serve as the basis for an extension of time to come into compliance.

61. Required Notification of Force Majeure. Defendants shall notify the DEQ (i) verbally as soon as practicable but in no event later than five (5) days and (ii) in writing as soon as practicable thereafter but in no case later than ten (10) days of when Defendants become aware that circumstances will occur, are occurring, or have occurred that have or are reasonably certain to delay compliance or cause noncompliance with any requirement of the Consent Decree. Such written notice shall set forth:

- a. the reasons for the delay or noncompliance;
- b. the projected duration of any such delay or noncompliance;
- c. the measures taken and to be taken to prevent or minimize such delay or noncompliance;
- d. the timetable by which such measures will be implemented and the date full compliance will be achieved; and
- e. available documentation supporting the claim that the delay or noncompliance is attributable to a force majeure event.

62. In the event the DEQ sends Defendants a written demand for the payment of penalties for alleged violations that occurred prior to the date this Consent Decree is entered, the verbal and written notification timelines in Paragraph 61 shall run from the date of such demand.

63. Failure to timely notify DEQ as described above shall constitute a waiver of any claim to inability to comply with a requirement of this Consent Decree for the period beyond the deadlines above until the time the notice was actually made. Notice under this paragraph shall be given to the DEQ Regional Director for the Piedmont Regional Office at the following:

Virginia Department of Environmental Quality
Piedmont Regional Office
Attn: Regional Director
4949-A Cox Road
Glen Allen, VA 23060
(804) 527-5020
(804) 527-5106 (fax)

64. Procedure for Extension. If DEQ agrees that the delay, anticipated delay, or noncompliance is attributable to a force majeure event, either the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by DEQ for such time as DEQ deems necessary to complete those obligations or the noncompliance will be deemed excused. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. DEQ will notify Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

65. DEQ Disagreement. If DEQ does not agree that the delay, anticipated delay, or noncompliance has been or will be caused by a force majeure event, DEQ will notify Defendants in writing of its decision. The decision of the DEQ shall become final thirty (30) days after the DEQ notifies Defendants, unless Defendants elect to invoke the dispute resolution set forth in

Section IX (Dispute Resolution). In any such dispute, Defendants shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that all reasonable efforts were exercised to avoid and mitigate the effects of the delay, and that Defendants complied with the requirements of this Section VIII (Force Majeure).

66. Failures resulting from a force majeure event shall not be considered a breach of this Consent Decree, and Defendants shall not be liable for any stipulated penalties occurring as a result of the force majeure event.

IX. DISPUTE RESOLUTION

67. Dispute Resolution Process. The Dispute Resolution procedures set forth in this Section IX (Dispute Resolution) shall be the exclusive mechanism to resolve disputes arising under this Consent Decree. The dispute shall be considered to have arisen when Defendants send Plaintiffs a written Notice of Dispute. Such Notice of Dispute shall clearly state the matter in dispute. Any such dispute shall first be subject to informal negotiations. The period of informal negotiations shall not exceed sixty (60) days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, Plaintiffs shall send to Defendants a Statement of Position within fifteen (15) days following the end of the period of informal negotiations. Such Statement of Position shall be binding unless, within thirty (30) days after Defendants' receipt of the Statement of Position, Defendants seek judicial review of the dispute in accordance with Paragraph 68.

68. Judicial Review. Defendants may seek judicial review of the dispute by filing with the Court and serving on Plaintiffs a motion requesting judicial resolution of the dispute.

The Plaintiffs may respond to Defendants' motion within the time allowed by the Rules of the Supreme Court of Virginia. Defendants shall have the burden of demonstrating, by a preponderance of the evidence, that the Plaintiffs' position is arbitrary and capricious, not in accordance with law, or contrary to the terms of this Consent Decree. Defendants consent to the Court's jurisdiction over this Consent Decree, over disputes arising under this Consent Decree, and over Defendants.

X. MISCELLANEOUS

69. This Consent Decree constitutes the entire agreement between the Defendants and the Commonwealth, and resolves the claims of the Plaintiffs against the Defendants for the violations specifically alleged in the Complaint, in Notices of Violation No. 1710-000546 dated December 4, 2017; No. 1802-000627 dated February 15, 2018; No. 1802-000762 dated June 19, 2018; No. 1807-000793 dated August 3, 2018 and No. ACO001201 dated June 17, 2019; and in DEQ inspections conducted through the date of lodging of this Decree, and violations related to clearing of area NE of Basin 2N.

70. Nothing in this Consent Decree shall affect the Defendants' obligation to comply with all applicable state and federal laws.

71. The Commonwealth accepts this Consent Decree in full satisfaction of the claims it asserted, or of all known claims it could have asserted as of the last site inspection conducted before the date of lodging of this Consent Decree, in its Complaint against the Defendants.

72. This Consent Decree may be modified only by order of this Court or written concurrence of DEQ. After making a good faith effort to obtain the concurrence of DEQ for the requested relief, the Defendants or the Commonwealth may petition this Court for modification of the terms and conditions of this Consent Decree.

73. The waiver or failure of any party to exercise any rights under this Consent Decree shall not be deemed a waiver of any right or any future rights. If any part of this Consent Decree shall for any reason be found or held invalid or unenforceable by any court of competent jurisdiction, such invalidity or unenforceability shall not affect the remainder of this Consent Decree, which shall survive and be construed as if such invalid or unenforceable part had not been contained herein.

74. If any provision of this Consent Decree is held to be invalid, void or unenforceable, all other provisions of this Consent Decree nevertheless will remain in full force and effect.

75. Headings in this Consent Decree are provided for convenience only and shall not limit, expand, modify or otherwise affect the meaning of any provision of the Consent Decree.

76. The Parties represent, through their signatures below, that their signatories below have full authority to enter into this Consent Decree, and that they are competent and over the age of majority.

77. This Consent Decree shall be interpreted, enforced and governed in accordance with the laws of the Commonwealth of Virginia, regardless of any conflicts-of-law principles.

78. Unless otherwise specified herein, whenever written notifications, communications, or submittals are required by this Consent Decree, such notifications, communications, or submittals shall be made to the individuals specified below via email and U.S. mail, or to such other individuals as may be designated by a Party on written notice to the other Parties:

As to the Plaintiffs:

Director, Enforcement Division
Virginia Department of Environmental Quality

P.O. Box 1105
Richmond, VA 23218

As to McCarthy Building Companies, Inc.:

McCarthy Building Companies, Inc.
2727 Paces Ferry Rd SE
Building 2, Suite 1600
Atlanta, GA 30339
Attention: Matt McMullan, Project Director
MMcMullan@McCarthy.com

With a copy to:

McCarthy Building Companies, Inc.
1341 North Rock Hill Road
St. Louis, Missouri 63124
Attention: Michelle Eller
MEller@McCarthy.com

As to Essex Solar Center, LLC:

Essex Solar Center, LLC
301 N. Lake Ave., Suite 202
Pasadena, CA 91101
Attention: Legal Department
CELegal@coronalenergy.com

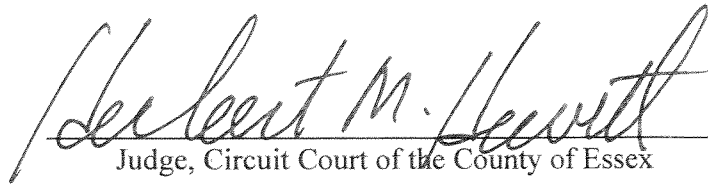
With copies to:

Essex Solar Center, LLC
3947 Lennane Drive
Sacramento, CA 95834
Attention: Asset Management
AssetManagement@coronalenergy.com

and

John Lain
McGuireWoods LLP
800 E. Canal Street
Richmond VA 23219
jlain@mcguirewoods.com

Enter: 03-18-20


Judge, Circuit Court of the County of Essex

WE ASK FOR THIS:

**DAVID K. PAYLOR, DIRECTOR OF THE
DEPARTMENT OF ENVIRONMENTAL QUALITY,
AND THE STATE WATER CONTROL BOARD**

By: 

Mark R. Herring
Attorney General of Virginia

Donald D. Anderson
Deputy Attorney General

Paul Kugelman (VSB No. 41624)
Senior Assistant Attorney General

Daniel W. Ingersoll (VSB No. 89749)*
Assistant Attorney General

Office of the Attorney General
202 North 9th Street
Richmond, VA 23219
(434) 951-6321 – telephone
(804) 786-0122 – facsimile
dingersoll@oag.state.va.us

*Counsel of record in this matter

*Counsel for David K. Paylor, Director of the Department of Environmental Quality, and the
State Water Control Board*

The undersigned consents to the entry of this Consent Decree, subject to public notice and comment.

MCCARTHY BUILDING COMPANIES, INC.

By: 

Heather Deane. (VSB No. 41895)

Bonner Kiernan Trebach & Crociata LLP

1233 20th Street, NW, 8th Floor

Washington, DC 20036

Phone: (202) 712-7039

Fax: (202) 712-7100

Counsel for McCarthy Building Companies, Inc.

The undersigned consents to the entry of this Consent Decree, subject to public notice and comment.

ESSEX SOLAR CENTER, LLC

By: 

John Lain (VSB No. 33005)

McGuireWoods LLP

800 E. Canal Street

Richmond, Virginia 23219

Phone: (804) 775-4381

Fax: (804) 698 -2097

Counsel for Essex Solar Center, LLC

APPENDIX A
HAILE DAM IMPACT DELINEATION

1. The boundary and study area line information shown hereon is for information purposes only and does not constitute a boundary survey by Wetland Studies and Solutions, Inc.

2. This drawing is horizontally referenced to the North American Datum of 1983, Virginia Coordinate System, South Zone, U.S. Survey Foot (VCS NAD 83). Impact areas were flagged and located in the field using a Trimble R1 GNSS receiver.

3. The locations mapped on this sheet depict the approximate boundaries of wetland and stream impacts. These boundaries are not survey located nor are they a legal substitute for a wetland Jurisdictional Determination.

4. The impacts to probable wetlands and/or streams were marked in the field with numbered pink survey flags and/or pink tape. Upland impact areas were flagged with orange-glo tape. The limit and depth of impacts shown on this map are based on the existing site conditions as of February 4, 2019. These limits and depths may change or migrate over time.

Legend

Study Area (2.46 ac.)

Approximate Parcel Boundaries

Culvert

WOUS Impacts (18 to 28", 6,498 sf)

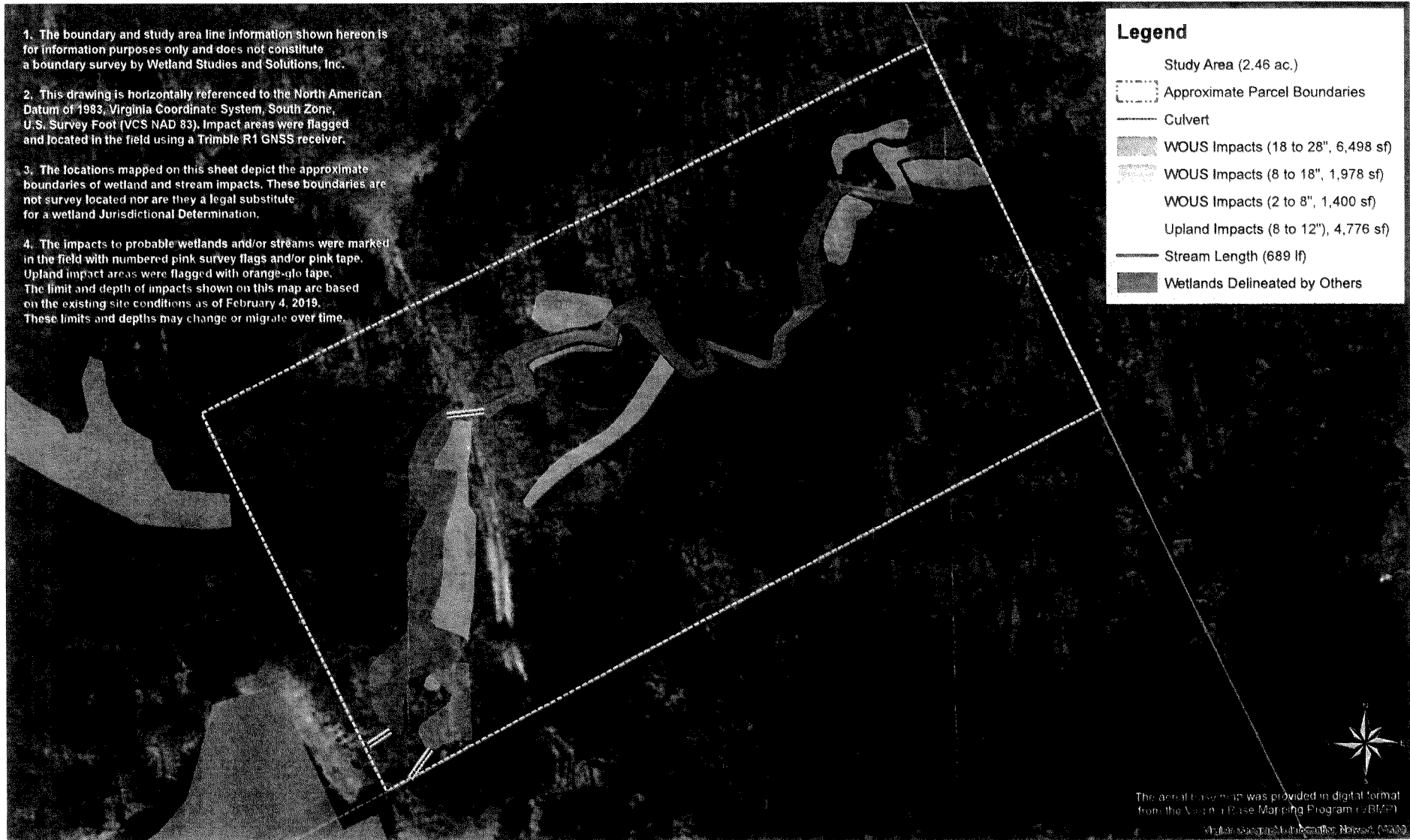
WOUS Impacts (8 to 18", 1,978 sf)

WOUS Impacts (2 to 8", 1,400 sf)

Upland Impacts (8 to 12"), 4,776 sf

Stream Length (689 lf)

Wetlands Delineated by Others



Wetland Studies and Solutions Inc.,
a **DAVEY** company

Coronal Energy at the Essex Solar Site
Impact Map, Haile Property Study Area (TM 46-160)
WSSI #30247.02

Exhibit A

